Memorandum Assessing Incompatibility with EU Law of Articles 37(6) and 68 of Spanish Preliminary Draft Law on Waste and Contaminated Soil

Submitted by *EUROPEN*, *UNESDA* and *EFBW*

16 December 2020

Memorandum

To:	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs DG GROW/B/2 – N105 4/66	European Commission
Drafted by:	Peter L'Ecluse Valérie Lefever	Van Bael & Bellis
Submitted by:	Francesca Stevens Nicholas Hodac Patricia Fosselard	EUROPEN UNESDA EFBW

Incompatibility with EU Law of Spanish Draft Law on Waste and Contaminated Soil (notification number 2020/658/E)

TABLE OF CONTENTS

1. INTRODUCTION

On 20 October 2020, Spain notified to the European Commission (the ***Commission***) a draft measure in accordance with the European Union (***EU***) Technical Regulations Information System (***TRIS***) consultation procedure, pursuant to Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (***TRIS Directive***).[1]

The measure notified is a Preliminary Draft Law on contaminated waste and soil (*Anteproyecto de Ley de Residuos y Suelos Contaminados*) (the ***Draft Law***).

The Draft Law purports to introduce the principles of circular economy and contribute to the fight against climate change and to the protection of the environment. Its stated objective is to minimise the negative effects of waste generation and management on both human health and the environment.

We believe that Article 37(6) and Article 68 of the Draft Law infringe EU law, including the free movement of goods.

We were requested by the European Organisation for Packaging and the Environment (EUROPEN), the European Soft Drinks Industry (UNESDA) and the European Federation of Bottled Waters (EFBW) to explain why these measures are incompatible with EU law.

Our analysis is structured as follows:

- A description of the objectives and content of Articles 37(6) and 68 of the Draft Law (section 2).
- As regards Article 68 of the Draft Law: an analysis of this provision under Article 30 and Article 110 TFEU which prohibit customs duties and measures having equivalent effect (section 3).
- An explanation why Articles 37(6) and 68 are measures having equivalent effect to quantitative restrictions under Article 34 and Article 35 TFEU (section 4).
- An explanation why these measures having equivalent effect to quantitative restrictions are not justified and infringe Article 34 and Article 35 TFEU (section 5).
- A conclusion and a list of measures requested from the Commission (section 6).

2. DESCRIPTION OF ARTICLES 37(6) AND 68 OF THE DRAFT LAW

2.1 Article 37(6) of the Draft Law

Article 37(6) of the Draft Law forms part of Title IV on extended product liability and reads as follows:

---

[1] This notification is available on the TRIS platform of the Commission: https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=658

> "*6. Producers of products who are established in another Member State or in third countries and who market products in Spain must designate a natural or legal person in Spanish territory as an authorised representative for the purposes of fulfilling the obligations of the producer of the product.*
>
> *Producers established in the national territory who sell products to another Member State in which they are not established must designate an authorised representative in that Member State. This representative will be the person responsible for fulfilling the producer's obligations in the territory of that Member State.*
>
> *For the purposes of monitoring and checking the compliance of the producer of the product with the extended producer responsibility, the specific regulation of each waste stream may lay down the requirements to be met by a natural or legal person in order to be appointed as an authorised representative.*"[2]

The Explanatory Memorandum presenting the Draft Law does not mention Article 37(6) as such but explains that Title IV of the Draft Law (which includes Article 37(6)) implements Directive (EU) 2018/851.[3] Directive (EU) 2018/851 amends Directive 2008/98/EC of 19 November 2008 on waste and repealing certain Directives (the ***Waste Framework Directive***), notably by introducing in the Waste Framework Directive a new Article 8a on general minimum requirements for extended producer responsibility schemes.

2.2 Article 68 of the Draft Law

Title VIII of the Draft Law establishes an excise duty on non-reusable plastic packaging (the ***Tax***), of which Article 68 is a feature. It is an indirect tax on the manufacture, importation or intra-EU acquisition of non-reusable plastic packaging which applies to all non-reusable plastic packaging, including packaging only partly composed of plastic (Articles 58 and 59 of the Draft Law).

The Tax applies throughout the Spanish territory (Article 60(1) of the Draft Law). The taxable amount is the quantity, expressed in kilograms, of plastic contained in the packaging falling within the objective scope of the Tax (Article 67 of the Draft Law). In practice, the Tax rate will be 0.45 euro per kilogram of plastic (Article 69 of the Draft Law).

However, Article 68 of the Draft Law allows taxpayers to deduct from the Tax base the amount of recycled plastic used in the manufacturing process, provided that the plastic being thus recycled comes from the territory where the Tax applies, *i.e.*, Spain (the ***Deduction from the Tax Base***):

---

[2] Free translation from the original Spanish text: "*6. Los productores de productos que estén establecidos en otro estado miembro o en terceros países y que comercialicen productos en España, deberán designar a una persona física o jurídica en territorio español como representante autorizado a efectos del cumplimiento de las obligaciones del productor del producto.*
Los productores establecidos en el territorio nacional que vendan productos a otro estado miembro en el que no estén establecidos deberán designar un representante autorizado en ese estado miembro. Dicho representante será la persona responsable del cumplimiento de las obligaciones de dicho productor en el territorio de ese estado miembro.
A efectos del seguimiento y la comprobación del cumplimiento de las obligaciones del productor del producto en relación con la responsabilidad ampliada del productor, en la regulación específica de cada flujo de residuos se podrá establecer los requisitos que debe cumplir una persona física o jurídica para poder ser designado como representante autorizado."

[3] Directive (EU) 2018/851 of 30 May 2018 amending Directive 2008/98/EC on waste, *O.J.E.U.*, 14.6.2018, L 150/109.

> "*Taxpayers who manufacture packaging may deduct from the tax base the amount of plastic incorporated in the manufacturing process, expressed in kilograms, from plastic recycled from products used in the territory where the tax applies.*
>
> *For the application of this deduction from the taxable base, the corresponding certification of the waste manager supplying the plastic incorporated in the manufacturing process will be required.*
>
> *The taxable amount will be the result of applying the deduction referred to in this Article to the taxable amount.*"[4]

The Explanatory Memorandum that forms part of the introduction to the Draft Law explains that the purpose of the Tax is to reduce the generation of waste. The Tax is "*intended to ensure that as little as possible of non-reusable plastic packaging is used in Spain*".[5] The purpose of the Deduction from the Tax Base is "*to encourage the recycling of these products*".[6]

3. ARTICLE 68 OF THE DRAFT LAW INFRINGES ARTICLE 30 TFEU AND ARTICLE 110 TFEU

Article 30 TFEU on the customs union provides that:

> "*Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.*"

In *Commission v Luxembourg and Belgium*, the Court of Justice of the European Union (***CJEU***) defined a charge "having equivalent effect" to a customs duty as follows:

> "*A charge having equivalent effect* […]*, whatever it is called and whatever its mode of application, may be regarded as a duty imposed unilaterally either at the time of importation or subsequently, and which, if imposed specifically upon a product imported from a Member State to the exclusion of a similar domestic product, has, by altering its price, the same effect on the free movement of products as a customs duty.*"[7]

Article 30 TFEU prohibits all charges imposed on goods by the fact that these goods cross internal EU borders, as explained by the CJEU:

---

4 Free translation from the original Spanish text: "*Los contribuyentes que realicen la fabricación de envases podrán reducir de la base imponible del impuesto la cantidad de plástico incorporado al proceso de fabricación, expresada en kilogramos, proveniente de plástico reciclado de productos utilizados en el territorio de aplicación del impuesto.*
Para la aplicación de dicha reducción en la base imponible será necesaria la correspondiente certificación del gestor de residuos proveedor del plástico incorporado al proceso de fabricación.
La base liquidable será el resultado de practicar sobre la base imponible la reducción a la que se refiere este artículo."

5 Free translation from the original Spanish text: "*El impuesto, por tanto, lo que pretende es que se utilice el menor número posible de estos envases de plástico no reutilizables en el territorio español*."

6 Free translation from the original Spanish text: "*Por otra parte, en aras de fomentar el reciclaje de estos productos, los fabricantes podrán reducir la base imponible en la cantidad de plástico incorporado al proceso de fabricación, expresada en kilogramos, proveniente de plástico reciclado de envases de plástico utilizados en el territorio de aplicación del impuesto*."

7 Judgment of 14 December 1962, *Commission v Luxembourg and Belgium*, Joined Cases 2/62 and 3/62, ECLI:EU:C:1962:45, para. 4 (emphasis added).

> "*It is settled case-law that any pecuniary charge, whatever its designation or mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having an effect equivalent to a customs duty* […]*, even if it is not imposed on behalf of the State*"[8]

The fact that the Deduction from the Tax Base is only available to producers using recycled plastic from Spain means that, conversely, producers selling in Spain products using recycled plastic from other Member States are taxed more heavily. In other words, the mere fact that the recycled plastic used in the products sold in Spain crossed a border (from its Member State of origin to Spain) triggers the inapplicability of the Deduction from the Tax Base and thus the application of a higher Tax compared to a situation where a producer uses Spanish recycled plastic.

Another way of looking at it would be to consider that recycled plastic from Spain and recycled plastic from other EU Member States are indisputably "similar products" within the meaning of *Commission v Luxembourg and Belgium*, as nothing distinguishes one from the other. However, only recycled plastic from other EU Member States is "negatively taxed", *i.e.*, does not benefit from a Deduction from the Tax Base.

As a result, the limitation of the Deduction from the Tax Base to Spanish recycled plastic amounts to a measure having equivalent effect to a customs duty on imports, which is contrary to Article 30 TFEU.

In addition, Article 68 arguably infringes Article 110 TFEU, which provides that:

> "*No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.*
>
> *Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.*"[9]

The CJEU confirmed that Article 110 TFEU must be understood to prohibit any tax measure that discourages the import of products from other Member States:

> "*According to settled case-law, Article 90 EC* [now Article 110 TFEU] *must be interpreted widely so as to cover all taxation procedures which, directly or indirectly, undermine the equal treatment of domestic products and imported products. The prohibition laid down in that article must therefore apply whenever a fiscal charge is likely to discourage imports of goods originating in other Member States to the benefit of domestic production*"[10]

This is certainly the case for the Deduction from the Tax Base which, by mostly benefiting Spanish producers, makes foreign products more costly and thus discourages imports of foreign products in Spain.

The CJEU confirmed this case law in unambiguous terms in the *Piotr Kawala* case:

---

8 Judgment of 17 September 1997, *Fazenda Pública*, Case C-28/96, ECLI:EU:C:1997:412, para. 20 (emphasis added).
9 Emphasis added.
10 Judgment of 8 November 200, *Stadtgemeinde Frohnleiten*, Case C-221/06, ECLI:EU:C:2007:657, para. 40 (emphasis added).

> "*A system of taxation may be considered compatible with Article 90 EC* [now Article 110 TFEU] *only if it is so arranged as to exclude any possibility that imported products are taxed more heavily than similar domestic products, so that it cannot in any event have discriminatory effect*"[11]

As explained in *Piotr Kawala*, "*barriers of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles 23 EC* [now Article 28 TFEU on the customs union]*, 25 EC* [now Article 30 TFEU, cited above] *and 90 EC* [now Article 110 TFEU, cited above]*, do not fall within the prohibition laid down in Article 28 EC* [now Article 34 TFEU on quantitative restrictions]." In other words, since Article 68 of the Draft Law infringes Article 30 TFEU and Article 110 TFEU, Article 34 TFEU on quantitative restrictions and measures having equivalent effect on imports does not apply. However, for the sake of completeness and in the hypothesis that Article 30 and Article 110 TFEU were found inapplicable, an analysis of Article 68 of the Draft Law under Article 34 TFEU is carried out below and shows an incompatibility with that Treaty provision as well (under sections 4 and 5).

4. ARTICLES 37(6) AND 68 OF THE DRAFT LAW ARE MEASURES HAVING EQUIVALENT EFFECT TO QUANTITATIVE RESTRICTIONS (ARTICLES 34 AND 35 TFEU)

Articles 34-36 of the TFEU prohibit national measures that create unnecessary and unjustified technical barriers to trade within the EU. The following sections show that the measures described in section 2 create obstacles to intra-EU trade that cannot be justified based on a legitimate objective.

National measures that are capable of hindering, directly or indirectly, actually or potentially, trade between Member States are deemed to be measures having an effect equivalent to quantitative restrictions and are therefore prohibited.[12] The following measures laid down in the Draft Law affect companies active in intra-EU trade and thus constitute measures equivalent to a quantitative restriction:

- Article 37(6): the obligation for producers established in other Member States who market products in Spain to designate an authorised representative in Spain for the purposes of fulfilling the obligations of the producer of the product (and, conversely, the obligation for Spanish producers who sell products in another Member State to appoint an authorised representative in that Member State) (section 4.1 below);
- Article 68: the limitation of the Deduction from the Tax Base to products containing recycled plastic coming from products used in Spain (section 4.2 below).

4.1 On the obligation to appoint an authorised representative for purposes of compliance with extended producer responsibility schemes (Article 37(6) of the Draft Law)

The obligation to appoint an authorised representative in the Member State where a company intends to sell its products has long been recognised to constitute a clear-cut restriction of intra-EU trade as it

---

11 Judgment of 10 December 2007, *Piotr Kawala*, Case C-134/07, ECLI:EU:C:2007:770, para. 29 (emphasis added).

12 Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82; judgment of 15 November 2005, *Commission v. Austria*, Case C-320/03, ECLI:EU:C:2005:684.

considerably increases the cost of doing business across EU internal borders. The CJEU confirmed it in no uncertain terms in *Commission v Belgium*:

> "*It is not disputed that the requirement imposed by the Belgian legislation constitutes an obstacle to the importation of the products concerned into Belgium, inasmuch as it compels undertakings established in other Member States to incur the cost of establishing a representative in Belgium, and that it may, as a result, make it difficult, if not impossible, for certain undertakings, in particular small or medium-sized undertakings to enter the Belgian market*."[13]

The obligation for producers selling their products in Spain to appoint a representative in that Member State similarly constitutes a measure having equivalent effect to a quantitative restriction on intra-EU imports under Article 34 TFEU. Additionally, the obligation (also included in Article 37(6) of the Draft Law) for Spanish producers to appoint a representative in other EU Member States where they sell their products is similarly restrictive, this time affecting exports (Article 35 TFEU).

In addition, these obligations go beyond what is required under EU law. The Explanatory Memorandum of the Draft Law refers to Directive (EU) 2018/851 as a reason for adopting Title IV of the Draft Law on the extended producer responsibility scheme (which includes Article 37(6)). This Directive introduced a new Article 8a in the Waste Framework Directive. Article 8a of the Waste Framework Directive sets outs general minimum requirements for extended producer responsibility schemes. The third and fourth indents of the fifth paragraph of Article 8a read as follows:

> "*Each Member State shall allow the producers of products established in another Member State and placing products on its territory to appoint a legal or natural person established on its territory as an authorised representative for the purposes of fulfilling the obligations of a producer related to extended producer responsibility schemes on its territory.*
>
> *For the purposes of monitoring and verifying compliance with the obligations of the producer of the product in relation to extended producer responsibility schemes, Member States may lay down requirements, such as registration, information and reporting requirements, to be met by a legal or natural person to be appointed as an authorised representative on their territory.*"[14]

The first paragraph quoted above makes clear that the Waste Framework Directive only requires Member States to give producers the possibility of appointing an authorised representative. As a result, the second paragraph quoted above should not be read as requiring Member States to impose the designation of an authorised representative, as this interpretation would contradict the first paragraph. The second paragraph should merely be understood as meaning that Member States may lay down requirements to be satisfied by authorised representatives.

---

13 Judgment of 2 March 1983, *Commission v Belgium*, Case 155/82, ECLI:EU:C:1983:53, para. 7 (emphasis added).
14 Emphasis added.

As a result, the two obligations to appoint an authorised representative included in Article 37(6) of the Draft Law are not required under EU law and are therefore illegal unless they are appropriately justified, which they are not (see, section 5 below).

4.2 On the exclusion from the Deduction from the Tax Base of products containing recycled plastic from products used in other Member States (Article 68 of the Draft Law)

Should Article 68 of the Draft Law not be considered contrary to Articles 30 and 110 TFEU (*see* above, section 3), it would still constitute a measure having equivalent effect to a quantitative restriction on imports under Article 34 TFEU.

The Deduction from the Tax Base restricts intra-EU trade due to its scope. It is limited to products containing Spanish recycled plastic. Spanish producers are based in Spain and have therefore easy access to recycled plastic made from Spanish plastic. It is thus relatively easy for Spanish producers to benefit from the Deduction from the Tax Base.

By contrast, foreign producers do not have such an easy access to plastic recycled from plastic used in Spain as they are based in other EU Member States. They can only benefit from the Deduction from the Tax Base if they first import the recycled plastic from Spain, incorporate it in their products and then export their final products back to Spain, which significantly increases their production costs.

In other words, limiting the Deduction from the Tax Base to products that incorporate Spanish recycled plastic favours Spanish producers over foreign producers which are more at risk of having to pay the full Tax, even if their products include recycled plastic that originated outside Spain. This limitation constitutes a measure having equivalent effect to a quantitative restriction on intra-EU imports under Article 34 TFEU.

In a case concerning Spain, the CJEU held that a system of deductions for expenditure on research and development and technological innovation activities which was less favourable for expenses incurred abroad than for expenses incurred in Spain, infringed Article 49 TFEU and Article 56 TFEU on the freedom of establishment and the freedom to provide services.[15] Even though it concerns goods, not services, the Deduction from the Tax Base entails a similar mechanism and should lead to a similar conclusion of incompatibility with the Internal Market.

The discriminatory effect of the Deduction from the Tax Base is compounded by Article 42 of the Draft Law, which provides that, as from 2025, it will only be permitted to place on the market PET bottles that contain at least 25% recycled plastic, with this limit being placed at 30% as from 2030. As a result, Spanish producers will likely benefit from a significant Deduction from the Tax Base (as it is less expensive and easy for them to use recycled plastic from their own country), while foreign producers which do not have a similarly easy access to Spanish recycled plastic may have to use non-Spanish recycled plastic and will therefore pay a higher Tax on their products. As a result, products from producers based in other Members States will be less competitive in Spain than similar products from Spanish producers.

---

15 Judgment of 13 March 2008, *Commission v Spain*, Case C-248/06, ECLI:EU:C:2008:161.

5. THE MEASURES HAVING EQUIVALENT EFFECT TO QUANTITATIVE RESTRICTIONS CANNOT BE JUSTIFIED AND THEREFORE INFRINGE ARTICLE 34 AND ARTICLE 35 TFEU

It is established case law that, when a Member State adopts a measure having equivalent effect to a quantitative restriction of intra-EU trade, such a restriction can be justified only when three cumulative conditions are satisfied:

- the Member State has a legitimate reason to adopt it (see, section 5.1 below);
- the measure is suitable to achieve the legitimate objective pursued (see, section 5.2 below); and
- the measure is proportionate (see, section 5.3 below).

The CJEU also held that, when a Member State adopts a measure which restricts the free movement of goods within the Internal Market, it bears the burden of proving that this restriction is justified.[16]

As will be explained below, we consider that Spain did not establish that the measures having equivalent effect to quantitative restrictions included in the Draft Law are justified.

5.1 Legitimate objective

Measures which have an effect equivalent to quantitative restrictions of intra-EU trade may be allowed if they are justified by the non-economic considerations of general interest provided for in Article 36 TFEU or established by case law of the European Courts (the so-called "mandatory requirements"). These exceptions are interpreted strictly and must be suitable and proportionate to attain the legitimate objective.

Article 37(6) of the Draft Law is presented as a reflection in Spanish law of Directive (EU) 2018/851 on extended producer responsibility (which was integrated in the Waste Framework Directive). More broadly, the extended producer responsibility scheme pursues an environmental objective as it is considered to "*form an essential part of efficient waste management*".[17]

Similarly, Article 68 of the Draft Law clearly aims to encourage recycling, which is a pro-environmental objective.

The protection of the environment has been found by the CJEU to constitute a legitimate objective.[18] However, Spain does not demonstrate that the restrictions are suitable and proportionate to achieve the legitimate objective of protecting the environment (see, sections 5.2 and 5.3).

---

16 Judgment of 23 December 2015, *Scotch Whisky Association and Others*, Case C-333/14, ECLI:EU:C:2015:845, paras 51-54 and case law cited.

17 Recital 21 of Directive (EU) 2018/851 of 30 May 2018 amending Directive 2008/98/EC on waste, *O.J.E.U.*, 14.6.2018, L 150/109.

18 Judgment of 1 July 2014, *Ålands Vindkraft*, Case C-573/12, ECLI:EU:C:2014:2037, para. 77; judgment of 20 September 1988, *Commission v Denmark*, Case 302/86, ECLI:EU:C:1988:421, para. 9; judgment of 14 July 1998, *Aher-Waggon*, Case C-389/96, ECLI:EU:C:1998:357, para. 19.

5.2 The restrictions are not suitable to achieve the legitimate objective

5.2.1 On the obligation to appoint an authorised representative for purposes of compliance with extended producer responsibility schemes (Article 37(6) of the Draft Law)

According to the Explanatory Memorandum, Title IV of the Draft Law, which concerns extended producer responsibility rules, "*mirrors the regulation established in this respect in Directive (EU) 2018/851*"[19], notably Article 8a (which was introduced in the Waste Framework Directive).

However, as explained above (see, section 4.1), Article 37(6) of the Draft Law goes beyond what is required by this provision, as it requires companies to appoint a representative, while Article 8a of the Waste Framework Directive only gives companies the choice to appoint an authorised representative. Article 37(6) of the Draft Law thus creates a significant obstacle to intra-EU trade as forcing companies to designate an authorised representative considerably increases the cost for foreign producers of selling products in Spain. As explained in *Commission v Belgium*, cited above (section 4.1), this cost may be such as to make it impossible for small and medium enterprises based in other Member States to sell their products in Spain.

This obstacle runs counter to the objective pursued by the minimum requirements set out under Article 8a of the Waste Framework Directive. The preamble to Directive (EU) 2018/851 makes it clear that the purpose of the general minimum requirements was precisely to avoid impediments to the functioning of the Internal Market:

> "*The general minimum requirements should reduce costs and boost performance, as well as ensure a level playing field, including for small and medium-sized enterprises and e-commerce enterprises, and avoid obstacles to the smooth functioning of the internal market.*"[20]

Additionally, introducing this restriction arguably infringes Article 8a of the Waste Framework Directive. While Article 8a only contains "general minimum requirements", it explicitly offers companies the choice whether or not to designate a representative. The default situation, absent a norm, is that natural and legal persons are free to act as they please. If the EU legislator found the need to specify that companies must have the choice to appoint a representative, it is because it most certainly wanted to offer them this right. By expressly depriving companies of this choice, Spain wrongly implements Article 8a of the Waste Framework Directive.

This reasoning applies to both situations envisaged by Article 37(6), *i.e.*, (i) when a foreign supplier (based in another EU Member State than Spain) wants to sell its products in Spain; and (ii) when a Spanish producer intends to sell its products in another EU Member State.

The restrictions provided for by Article 37(6) of the Draft Law are therefore not adequate to achieve the objective of implementing Directive (EU) 2018/851 into the Spanish legal system as the relevant provision (Article 8a of the Waste Framework Directive) can be implemented without it.

---

19 Free translation from the original Spanish text: "*La ley dedica su título IV a la «Responsabilidad ampliada del productor del producto», recogiendo la regulación establecida al respecto en la Directiva (UE) 2018/851*."

20 Recital 22 of Directive (EU) 2018/851 of 30 May 2018 amending Directive 2008/98/EC on waste, *O.J.E.U.*, 14.6.2018, L 150/109 (emphasis added).

Finally, Spain has not established that appointing an authorised representative (in Spain for foreign producers and in other EU Member States for Spanish producers) can protect the environment. On the contrary, in *Commission v Belgium*, the CJEU dismissed the idea that obliging companies to appoint a representative may deter them from breaching the rules that the representative is supposed to observe:

> "*Even though criminal penalties may have a deterrent effect as regards the conduct which they sanction, that effect is not guaranteed and, in any event, is not strengthened, in the case of a manufacturer in another Member State who has been issued with an approval, solely by the presence on national territory of a person who may legally represent the manufacturer.*"[21]

Requiring companies to appoint a representative thus cannot strengthen compliance with the extended producer responsibility scheme and, in turn, cannot protect the environment.

The two restrictions foreseen in Article 37(6) of the Draft Law are therefore not suitable to achieve the two objectives identified under section 5.1.

5.2.2 On the exclusion from the Deduction from the Tax Base of products containing recycled plastic from products used in other Member States (Article 68 of the Draft Law)

As explained above, (section 2.2), the purpose of the Deduction from the Tax Base is "*to encourage the recycling of these products*".[22]

While offering a Deduction from the Tax Base to those who use recycled plastic in their products can definitely promote recycling, the restriction of intra-EU trade resulting from the Deduction from the Tax Base, *i.e.*, the limitation of the Deduction from the Tax Base to recycled plastic coming from Spain, is not capable of fostering recycling. On the contrary, it makes the recycling of non-Spanish plastic less advantageous (as it will not help decrease the Tax) and thus discourages producers from recycling plastic coming from other EU Member States than Spain.

In other words, opening the Deduction from the Tax Base to all producers using recycled plastic (regardless of the origin of the recycled plastic) would better encourage recycling, while at the same time not restricting intra-EU trade.

As a result, the restriction to trade, *i.e.*, the exclusion of non-Spanish recycled plastic from the Deduction from the Tax Base, is not suitable to achieve the objective of promoting recycling.

5.3 The restrictions are not proportionate

Measures restricting the free movement of goods must comply with the principle of proportionality. As explained above (section 5), Spain bears the burden of proving that the objective pursued by the restrictions

---

21 Judgment of 2 March 1983, *Commission v Belgium*, Case 155/82, ECLI:EU:C:1983:53, para. 15 (emphasis added).

22 Free translation from the original Spanish text: "*Por otra parte, en aras de fomentar el reciclaje de estos productos, los fabricantes podrán reducir la base imponible en la cantidad de plástico incorporado al proceso de fabricación, expresada en kilogramos, proveniente de plástico reciclado de envases de plástico utilizados en el territorio de aplicación del impuesto*."

to intra-EU trade cannot be achieved by less restrictive means.[23] In other words, Spain must offer "*an analysis of the appropriateness and proportionality of the measure adopted*" and "*specific evidence substantiating its arguments*".[24]

Neither the TRIS notification nor the Draft Law offer such an analysis. As a matter of fact, point 8 of the TRIS notification ("*Main Content*") does not even mention the Tax or the Deduction from the Tax Base and only briefly mentions "*the adoption of extended responsibility schemes for certain plastic products, indicating the costs that producers of these products must cover*", without referring to the obligation to appoint an authorised representative. It is, incidentally, interesting to note that the English version of the Draft Law available on the TRIS platform is incomplete and does not include Article 37(6) and Article 68.

5.3.1 On the obligation to appoint an authorised representative for purposes of compliance with extended producer responsibility schemes (Article 37(6) of the Draft Law)

As explained above, Article 37(6) of the Draft Law is presented in the Explanatory Memorandum as a mere implementation of EU law (more specifically, Article 8a of the Waste Framework Directive as introduced by Directive (EU) 2018/851). However, Article 8a of the Waste Framework Directive does not include any obligation for companies to appoint authorised representatives: it only requires Member States to give this option to companies.

Obliging companies to appoint an authorised representative was not considered necessary by the European legislator to improve the efficiency of extended producer responsibility schemes and Spain does not explain why it found it necessary. Turning a choice into an obligation that restricts intra-EU trade without providing any reason is by definition disproportionate.

It is also striking that the obligation of appointing an authorised representative provided for by Article 37(6) of the Draft Law also applies to Spanish companies wishing to do business in other Member States. Spain thus assumes that the legal systems of other EU Member States are not capable of ensuring compliance with their own national extended producer responsibility schemes without the presence of an authorised representative on their territory. Spain does not explain the reasons for this assumption.

Finally, there are other mechanisms available to ensure compliance with the extended responsibility scheme that would be less restrictive of intra-EU trade. Some of the alternatives to the designation of a representative are mentioned in *Commission v Belgium*:

> "*In that respect, it is clear that, as far as effective prevention is concerned, only the preliminary formalities connected with the issue of approval and the checks carried out at that stage, and, possibly, at the moment when the goods are placed on the market can provide an adequate safeguard for the attainment of the objectives pursued by Article 36* [TFEU – *i.e.*, the protection of legitimate interests]"[25]

The Draft Law does not explain whether alternatives have been considered and why they were not selected.

---

23 Judgment of 23 December 2015, *Scotch Whisky Association and Others*, Case C-333/14, ECLI:EU:C:2015:845, paras 51-54 and case law cited.

24 Judgment of 26 April 2012, *ANETT*, Case C-456/10, ECLI:EU:C:2012:241, para. 50.

25 Judgment of 2 March 1983, *Commission v Belgium*, Case 155/82, ECLI:EU:C:1983:53, para. 15 (emphasis added).

5.3.2 On the exclusion from the Deduction from the Tax Base of products containing recycled plastic from products used in other Member States (Article 68 of the Draft Law)

As explained above, the restriction of the intra-EU trade does not result from the Deduction from the Tax Base as such but rather from its scope: by limiting it to products including recycled plastic from Spain (and not from other Member States), Spain favours its own producers which have easier and presumably cheaper access to Spanish recycled plastic and places foreign producers at a competitive disadvantage.

The exclusion of foreign recycled plastic from the Deduction from the Tax Base may require producers based in other EU Member States than Spain to adjust their production chain in order to incorporate Spanish recycled plastic, even when they already use recycled plastic in their products that originates from other EU Member States than Spain. As a result, producers incur additional costs, even when they use recycled plastic and therefore presumably accomplish the objective which the Draft Law pretends to pursue.

More importantly, this restriction of trade is not necessary to achieve the purpose of the Deduction from the Tax Base, which is to encourage recycling, and, more broadly, to protect the environment. In fact, a Deduction from the Tax Base that would not be limited to Spanish recycled plastic would be more effective at promoting recycling as it would be available to more producers that are not based in Spain but wish to sell their products in that Member State.

As a result, the scope of the Deduction from the Tax Base constitutes a restriction to trade that is not proportionate to the objective of promoting recycling or protecting the environment.

6. CONCLUSION AND REQUEST TO THE COMMISSION

Our findings can be summarised as follows.

<u>As regards Article 37(6) of the Draft Law:</u>

- This provision requires (i) producers based in other Member States wishing to sell their products in Spain to appoint an authorised representative in Spain for the purpose of complying with the rules on extended producer responsibility scheme; and (ii) Spanish producers to appoint an authorised representative in the Member States where they wish to sell their products in the context of the same rules. This double obligation considerably increases the cost of doing cross-border business. Requiring companies to appoint representatives has been considered by the CJEU to constitute a clear restriction of intra-EU trade.
- This restriction is not justified:
    - The Draft Law mentions as an objective the implementation of Directive (EU) 2018/851 (which introduced Article 8a in the Waste Framework Directive). However, this Directive does not require Member States to oblige companies to appoint a representative. On the contrary, it requires Member States to allow companies to do so, which necessarily implies that companies can choose not to. This restriction is thus neither adequate, nor proportionate to this objective.
    - Spain has failed to show that this restriction is adequate or necessary to achieve the broader objective of the Draft Law, which is the protection of the environment. The CJEU

held in *Commission v Belgium* that appointing a representative does not deter companies from infringing their obligations under EU law.

- As a result, Article 37(6) of the Draft Law infringes both Article 34 TFEU (which prohibits quantitative restrictions on imports and all measures having equivalent effect) and Article 35 TFEU (which prohibit quantitative restrictions on exports and all measures having equivalent effect) and cannot be justified.

As regards Article 68 of the Draft Law

- This provision reduces the base of a Tax on non-reusable plastic packaging by the amount of recycled plastic used in the manufacturing process, provided that the plastic being thus recycled comes from Spain. This constitutes a clear restriction of intra-EU trade: Spanish producers have better and cheaper access to recycled plastic coming from Spain than producers based in other Member States and are therefore more likely to pay a lower Tax.
- Article 68 of the Draft Law constitutes a measure having equivalent effect to a customs duty. The Deduction from the Tax Base mostly benefits Spanish producers, which discourages imports of products from other Member States. While recycled plastic from Spain and recycled plastic from other Member States are entirely comparable products, only recycled plastic from Spain benefits from the Deduction from the Tax Base. In other words, the mere fact that recycled plastic crosses a border to be used in products sold in Spain causes the Deduction from the Tax Base not to apply. Article 68 of the Draft Law therefore infringes Article 30 and Article 110 TFEU.
- Should Article 68 of the Draft Law not be considered as a measure having equivalent effect to a customs duty, it then constitutes a measure having equivalent effect to a quantitative restriction as it hinders intra-EU trade. This restriction is not justified. While the Deduction from the Tax Base promotes recycling and thus protects the environment (which is considered a mandatory requirement under EU law), its limitation to recycled plastic originating in Spain is neither adequate nor proportionate to this objective. On the contrary, limiting the Deduction from the Tax Base to Spanish plastic discourages recycling using plastic from other Member States and thus impedes recycling. In other words, the objective of promoting recycling can be better achieved by not limiting the Deduction from the Tax Base to Spanish plastic.

We therefore request the Commission to adopt a detailed opinion concluding that the notified Draft Law may create customs and quantitative barriers to the free movement of goods that are not justified. By extending the standstill period by six months following the TRIS notification in accordance with Article 6(2) of the TRIS Directive (*i.e.*, three months following the end of the three-month standstill period), this detailed opinion will provide Spain with the opportunity to explain how it intends to address the issues identified above.

_____